

July 30, 2014

Samantha A. Arens
Staff Counsel
Chief Counsel's Office
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512

Re: Your Request for Informal Assistance
Our File No. I-14-125

Dear Ms. Arens:

This letter responds to your request for advice regarding the gift provisions of the Political Reform Act (the "Act").¹ Please note that the Commission is not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71). Moreover, because you request general guidance and your request does not involve a particular decision, we render informal assistance.²

QUESTION AND ANALYSIS

This letter responds to your general inquiry about the Act's exceptions for gifts of travel. As an initial matter, you are correct that the two provisions that you discuss are different in application and effect.³

- Section 89506 is an exception to the gift limits of the Act. Despite the application of Section 89506, the payment is still considered a gift to the official for purposes of reporting and disqualification.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

³ A third possible exception allows alternate disclosure (Form 801) where a payment is more a gift to the agency than a gift to the specific official. You have not asked about this provision.

- Regulation 18950(c)(2), on the other hand, was intended to carve out a more limited exception by which a payment would not be considered a gift or income under limited circumstances. In essence, that exception recognizes that in some circumstances money is exchanged between agencies so that an official may perform his or her job. These transactions were never intended to be reportable or potentially disqualifying gifts or income to the official because the payments were used to conduct agency business and not to provide a personal benefit to the official.

Additionally, the two exceptions are not mutually exclusive and, under some occasions, either exception may be available. However, either one or the other must be chosen, and an official cannot cross apply the benefits from one to another. For example, Section 89506 specifically allows any travel related expenses and up to three days of unrestricted lodging for a limited speaking engagement on the middle day. Under Regulation 18950 an overnight stay of even one night would require some justification, the travel amounts would, for the most part, be limited to applicable state per diem rates, and there would be other restrictions on the cost of the travel.

You posited the following specific examples:

(1) An Energy Commission program manager flies to Irvine to speak at a symposium hosted by the University of California at Irvine (UCI). The program manager speaks about hydrogen refueling station development in California, including programs run by the Energy Commission to implement state policy on hydrogen infrastructure. UCI has received hydrogen-related grants from the Energy Commission in the past. UCI offers to reimburse the Energy Commission employee's travel, lodging, and per diem expenses on the day immediately preceding the presentation, the day of the presentation, and the day after the presentation. The amount of these payments exceeds \$440.

Regulation 18950(c) states that there is an exception for a payment for travel and related per diem expenses that is received from a state, local, or federal government agency (UCI) for education, training, or other interagency programs or purposes (the manager in question is providing training and education at the UCI symposium *as part of that manager's job at the CEC*).⁴ Therefore, the payment appears to qualify for the exception in Regulation 18950.1 with respect to the "related per diem expenses." Because your hypothetical did not provide any information explaining why a three day stay is necessary to make a speech at UCI, it appears that a portion of this travel payment would be in excess of the amount allowable under Regulation 18950(c) and would not qualify for the exception.

However, if the official wishes to receive a three day stay in return for the presentation, he or she may do so by reporting the gift under Section 89506. The Commission does not

⁴ Indicia that this is a work related task include CEC treating the manager's time at the symposium as compensated work time and the manager might accrue informal CTO for the hours at the symposium. At the other extreme might be a situation where an employee might want to discuss matters at the symposium on his own time outside of CEC control. Obviously these are two extremes and circumstances in the middles will need to be evaluated independently.

regulate how an official uses agency time, so it would be up to the agency to determine what provisions of state law would allow the extra two days' time away from the job.

(2) A project manager at the Energy Commission flies to Long Beach to speak at a workshop, hosted by the U.S. Environmental Protection Agency, on emission reduction strategies. The project manager gives a keynote address on climate change science and the Energy Commission's research on climate change impacts on the energy sector, and in particular on a highly-potent greenhouse gas used in the electric industry. The federal agency pays the Energy Commission employee's travel, lodging, and per diem expenses on the day immediately preceding the presentation, the day of the presentation, and the day after the presentation. The amount of these payments exceeds \$440.

Under these hypothetical facts, the payment again appears to qualify for the provisions of Regulation 18950 with respect to the "related per diem expenses." Because your hypothetical did not provide any information explaining why a three day stay is necessary to make a speech in Long Beach, it appears that a portion of this travel payment would be in excess of the amount allowable and would not qualify for the exception .

However, if the official wishes to receive a three-day stay in return for the presentation, he she may do so by reporting the gift under Section 89506. The Commission does not regulate how an official uses agency time, so it would be up to the agency to determine what provisions of state law would allow to the extra two days' time away from the job

(3) An Energy Commission analyst flies to Washington, D.C. for the purpose of giving a presentation at a public meeting hosted by the U.S. Department of Energy. The analyst speaks on the Energy Commission's role in setting solar electric equipment requirements for multiple statewide solar programs. In particular, the Energy Commission maintains a database of eligible solar electric equipment. The purpose of the DOE meeting was to find ways in which the Energy Commission's equipment database can help other states achieve solar goals, and to find other funding sources for the Energy Commission to maintain the database. The National Renewable Energy Laboratory, a federally funded national laboratory, which prepared a white paper for the Energy Commission on maintenance of the database, reimburses the analyst for travel, lodging, and per diem expenses for the day before, the day of, and the day after her presentation. The amount of these payments exceeds \$440.

Again, under the above example, the official may claim the full cost of the travel payments as a gift under Section 89506 because he or she was making a public presentation on a matter of public policy within the United States. The gift could include up to three nights at the hotel, all meals during the period, and there would be no restrictions on the actual transportation expense. The payment would have to be reported as a gift by the official.

In the alternative, it appears the payment could qualify under the provisions of Regulation 18950.1 as the type of payment made in conjunction with official agency business. Under this method, the payment would not be reportable by the official but it would have to meet the provisions required by the regulation including reporting by the agency on a Form 801. If this

method is used, the travel must comply with state travel and per diem rules for out-of-state travel.

(4) A senior engineer at the Energy Commission volunteers on a federal advisory committee funded by multiple federal agencies. Importantly, the engineer volunteers on his own time and not on behalf of the Energy Commission. The federal advisory committee is created by the federal government to produce a national climate assessment for the White House (a non-binding recommendation). The engineer is considered, for purposes of his work on the committee, to be a non-salaried employee of the federal government. The engineer's travel costs to Washington D.C., and lodging and per diem while there, are reimbursed by the Department of Commerce. Those costs exceed \$440 per trip.

Here the senior engineer is being paid travel expenses in connection with his or her job as a "non-salaried employee of the federal government." As such, there are no reporting obligations under the Act. (See Section 82030(b)(2).)

(5) A Commissioner at the Energy Commission receives an offer to serve as a member of an energy-related federal advisory committee. The committee is funded by the Department of Energy. The committee makes non binding recommendations to federal officials regarding federal energy policy matters. The Commissioner receives no salary as a member of the committee, but travel costs to Washington D.C., and lodging and per diem while there, are reimbursed by the Department of Energy. Those costs exceed \$440 per trip.

Same answer as previous example.

I hope this general guidance is helpful. If you have other questions on this matter, or are confronted with an actual factual situation, please feel free to contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
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